

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TODD EUGENE STEINBERG,

Defendant-Appellee.

UNPUBLISHED

June 23, 2000

No. 218977

Oakland Circuit Court

LC No. 94-133144-FH

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order sentencing defendant, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to five to twenty years' imprisonment for his conviction for possession with intent to deliver more than 50 but less than 225 grams of cocaine,¹ MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).² We affirm.

The prosecution first argues that the trial court abused its discretion by deviating from the mandatory minimum sentence for reasons that were neither substantial nor compelling. We disagree.

The Legislature has prescribed a minimum sentence of ten years for the crime of possession with intent to deliver more than 50 but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Courts may depart from this minimum term if the court finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). In deciding if there are substantial and compelling reasons to depart, the court may only use objective and verifiable factors. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995).

In *Fields*, *supra*, the Michigan Supreme Court made several observations in hopes of clarifying what qualified as substantial and compelling reasons. Courts should place emphasis on mitigating circumstances surrounding the offense which do not warrant a finding of innocence, but do make the defendant less culpable. The court should also look at the defendant's prior record, the defendant's age, and the defendant's work history. Factors arising after the defendant's arrest should be given the same weight as preexisting factors. A defendant's cooperation with law enforcement should be given special attention. *Fields*, *supra*, 448 Mich 76-77.

The current sentencing court considered several factors which arose after defendant's arrest in determining that substantial and compelling reasons existed to depart from the minimum sentence. First, the trial court found that defendant's incarceration record was outstanding; while in prison, defendant obtained education and rehabilitation, participated in the building trades and had only one ticket for "inability to drop." The trial court also cited defendant's conduct before incarceration; defendant obtained employment and out-patient treatment for drug abuse and major depression. His employer described him as a model employee. Lastly, the trial court found that defendant had family support. The trial court noted that there was a stronger argument as of March 8, 1999, for departure then there was as of May 27, 1997.

Existence or non-existence of a particular factor is a factual determination for the sentencing court to determine, and is, therefore, reviewed for clear error. *Fields, supra*, 448 Mich 77-78. The trial court did not clearly err in determining the existence of these particular factors. The trial court's determination that defendant has an outstanding incarceration record is amply supported by the block report, Department of Corrections Prisoner Program and Work Assignment Evaluations and certificates of completion for building trade training and substance abuse awareness education attached to defendant's presentence investigation report.

The presentence investigation report also established that defendant's post-arrest conduct was a positive factor. Defendant sought psychological treatment for drug abuse and major depression a mere month after his arrest and continued until his first sentencing. His post-arrest employer also contributed a letter describing defendant as a valuable employee who was dependable and competent. The employer stated that defendant could have a job for as long as he needed one. Although defendant admitted to drug use prior to sentencing, the trial court did not clearly err in determining that defendant's post-arrest conduct was a positive factor.

The trial court also did not clearly err in determining that defendant had family support. Defendant's post-arrest employer noted that defendant had a child that needed him. Defendant's post-arrest psychological counselor wrote that defendant and his fiancé had a loving relationship and were seeking joint therapy for his drug abuse and major depression problems. The counselor noted that the birth of defendant's baby had affected defendant's ability to accept his drug problem and to turn his life around, and that defendant wanted to raise his son. Although this Court found that the original sentencing court clearly erred in finding family support when considering defendant's family support up until sentencing, defendant has had continued family support. In the April 7, 1997, presentence investigation report, the probation officer found that defendant's fiancé was supportive and would be there for defendant upon his release, but could not attend the sentencing hearing because she had to attend to her ailing mother at the Mayo Clinic in Minnesota. The trial court did not, therefore, clearly err in determining that defendant had family support.

The next inquiry is whether the trial court correctly determined that these factors were objective and verifiable. This review is de novo. *Fields, supra*, 448 Mich 77-78. Defendant's post-incarceration record is objective and verifiable, as the presentence investigation report contains Department of Corrections documents which reflect defendant's conduct and completion of courses. Defendant's post-arrest conduct is also objective and verifiable as defendant's counselor and employer

provided letters which established that defendant's conduct had been model for quite some time. Defendant's family support is also objectively and verifiably described by his counselor for pre-conviction family support and by his fiancé's father's discussion with the probation officer for post-conviction family support.

This Court must next review, for an abuse of discretion, the trial court's determination that these objective and verifiable factors are substantial and compelling. *Fields, supra*, 448 Mich 77-78. The Michigan Supreme Court remanded this case to the trial court for the reasons set forth in Judge Talbot's prior dissenting opinion, wherein he wrote that:

. . . It is improper for a sentencing court to consider in isolation a single positive aspect of a defendant's record without articulating why this factor, given the defendant's record as a whole, provides a significant and compelling basis for excepting the defendant from the legislative mandated sentencing regime. See *Johnson, supra* at 173-174. Here, defendant's fourth habitual offender status represents a significant counterweight against his successes while incarcerated. Accordingly, I would conclude that the reason given by the trial court for departing below the presumptive minimum sentence does not warrant departure.

Here, the trial court has articulated not one, but three reasons for departing from the mandatory minimum sentence. The trial court stated, as its reason for deviation, that defendant's post-conviction behavior was model and that his post-arrest behavior was strong and appropriate and that the Department of Corrections would not have the problems it now has if prisoners chose to take advantage of the opportunities available while incarcerated. While this Court agrees with Judge Talbot that defendant's fourth habitual offender status is a significant counterweight when just considering the single positive factor of his post-incarceration record, the trial court did not abuse its discretion in deviating where defendant showed positively in post-arrest behavior, post-conviction behavior (including work history) and family support.

In *People v Hellis*, 211 Mich App 634, 650-651; 536 NW2d 587 (1995), this Court upheld a deviation below the minimum sentence where the defendant was convicted of delivery of more than 50 but less than 225 grams of cocaine due to his post-arrest "drastic change in lifestyle." The trial court cited completion of an eighteen-day outpatient drug treatment program, weekly outpatient sessions, extensive community service, and the defendant's apparent abstention from controlled substances, and deviated despite the defendant's fourteen-year history of drug related criminal activity. This Court found that, under these circumstances, the trial court did not abuse its discretion. *Id.*

In the present case, defendant has attended outpatient drug and depression treatment and has a model post-incarceration history. While incarcerated, he has abstained from the use of controlled substances. Similarly, the trial court here has not abused its discretion in finding that there were substantial and compelling reasons for departing from the minimum sentence.

The prosecution argues that the trial court violated the law of the case doctrine by citing defendant's post-incarceration record as its primary reason for deviating where the Supreme Court's

adoption of Judge Talbot's dissent states that defendant's post-incarceration record was not a substantial and compelling reason to deviate in light of defendant's fourth habitual offender status. We find this argument unpersuasive.

The Michigan Supreme Court has defined the law of the case doctrine as follows:

If an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. [*People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 57 (1995).]

However, the Supreme Court's adoption of Judge Talbot's dissent only precludes a finding that the post-incarceration record alone is not a substantial and compelling reason for deviation in light of defendant's fourth habitual offender status. The dissent does not preclude a finding that other factors, when combined with defendant's post-incarceration record, could be substantial and compelling reasons for downward departure. Here, the trial court decided that defendant's post-incarceration record, as well as his post-arrest record and family support, were substantial and compelling reasons for deviation.

The prosecution next argues that the trial court abused its discretion in imposing defendant's sentence as the sentence violates the principle of proportionality. We disagree. "A given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Under the habitual offender act, MCL 769.12(a); MSA 28.1084(a), the trial court *may* sentence defendant to imprisonment for life or a lesser term. Since this language is permissive, and not mandatory, the habitual offender act only fixes the upper boundaries of the trial court's discretion. The trial court is not obliged to impose enhanced punishment where the defendant is an habitual offender. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991).

A sentence within the statutory limits established by the Legislature is not an abuse of discretion where an habitual offender's felony, in the context of his other felonies, evidences that the defendant is unable to conform his conduct to the laws of society. *Hansford, supra*, 454 Mich 326. Here, however, the trial court found that defendant is able to conform his conduct to the laws of society. The trial court stated that it was imposing a lenient sentence on defendant because of his post-arrest conduct, his post-incarceration conduct and his family support. As discussed above, these findings were supported by the presentence investigation report and its attachments and were objective and verifiable.

This Court will not substitute its judgment for that of the trial court. The trial court stated its reasons for leniency and this Court can find no abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Helene N. White

¹ The amount involved was 58 grams.

² This is the third time defendant has been sentenced for this offense. Defendant pleaded guilty to the offense and to being a fourth habitual offender. He was initially sentenced to a term of three to twenty years, a departure from the statutory mandatory minimum of ten years. On the prosecutor's appeal, this Court remanded the case to the trial court for resentencing before a different judge, finding that the court clearly erred in finding substantial and compelling reasons for departing from the mandatory minimum sentence. Defendant was resentenced before a different judge, who found substantial and compelling reasons to depart, and imposed a sentence of six to twenty years. The prosecution again appealed and this Court affirmed over Judge Talbot's dissent. The Supreme Court, in lieu of granting the prosecutor's appeal, issued an order vacating the judgment of this Court and remanding to the trial court for resentencing for the reasons set forth in Judge Talbot's dissent. Defendant was resentenced based upon the record made at the resentencing proceeding. The court again departed from the mandatory minimum and this appeal ensued.